BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RICHARD L. WOODS	)	
Claimant	)	
VS.	)	
	)	
BRG PRECISION PRODUCTS, INC.	)	Docket No. 1,061,220
Respondent	)	
AND	)	
	)	
HARTFORD FIRE INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier appealed the December 4, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark. James B. Zongker of Wichita, Kansas, appeared for claimant. Bruce L. Wendel of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the December 4, 2012, preliminary hearing and exhibits thereto; the transcript of the July 26, 2012, discovery deposition of claimant; and all pleadings contained in the administrative file.

ISSUES

In a December 4, 2012, preliminary hearing Order, ALJ Clark found "that the Claimant was injured out of and in the course of his employment with the Respondent on March 13, 2012, and adopts the opinions of Dr. Murati as the prevailing factor being the accident of March 13, 2012."[1] The ALJ awarded medical benefits and temporary total disability benefits.

[1] ALJ Order (Dec. 4, 2012) at 2.

Respondent asserts the ALJ erred and exceeded his jurisdiction by: (1) finding claimant's work activities were the prevailing factor causing his current complaints, symptoms and need for medical treatment and (2) requiring respondent to provide medical treatment and temporary total disability benefits to claimant.

Claimant asks the Board to affirm the ALJ's preliminary order.

The issues are:

1. Did claimant sustain a personal injury by accident arising out of and in the course of his employment with respondent? Specifically, was claimant's accident the prevailing factor causing his injury and current need for medical treatment?

2. If so, did the ALJ exceed his jurisdiction in granting claimant's request for medical treatment and temporary total disability benefits?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

In 1991, claimant underwent low back surgery for a work-related injury. The surgery was performed by Dr. Eustaquio O. Abay, II.

Claimant's July 26, 2012, Deposition Testimony

Claimant began working for respondent in 2004, and in QA inspecting clocks since 2005. Other workers would use a cart to bring the clocks, which came in various sizes and weights, to claimant. The clocks were placed on a table 42 inches high, so that claimant could inspect them. If a clock passed claimant's inspection, he took it 40 to 60 feet to shipping and placed it on a shelf. Claimant's application for hearing indicated he inspected clocks that weighed up to 100 pounds. Claimant testified that he did not have access to a cart like his co-employees.

On a date he did not remember, claimant told Mike Downey, a former supervisor, the clocks were too heavy. Mr. Downey was told by claimant that he was exceeding restrictions given to him following the 1991 surgery. Claimant testified he made similar complaints to his most recent supervisor, Kevin Wittorff.

On March 12, 2012, at 3 p.m., claimant was lifting a 96-inch-long clock weighing approximately 50 pounds, when he felt immediate back pain. Claimant did not report the back injury that day and continued working until his shift ended at 5 p.m.

On March 13, 2012, claimant returned to work, but felt stiff. Claimant made arrangements with Mr. Wittorff to leave work at noon, in order to look for a part for his personal pedestal fan. Again, claimant did not report the injury to anyone.

On March 14, 2012, claimant did not go to work as he was having severe back pain and could not get off the floor. Claimant called Mr. Wittorff and reported having severe back pain and indicated lifting at work caused the back pain. Claimant either spoke to Mr. Wittorff or left messages for him on March 15, 16 and 19 about the back injury.

On March 16, 2012, claimant contacted the office of Dr. Abay, who had performed claimant's 1991 back surgery. Dr. Abay's office referred claimant to his family physician, who was on vacation. Claimant saw Dr. Craig R. Parman, an associate of claimant's family physician, on March 20, 2012.

After seeing Dr. Parman, claimant met with Mr. Wittorff and Julie Matzen, respondent's human resources manager. Claimant told them of having severe pain from lifting he did at work and that he should not have been put in QA because of his back condition. He told them of being forced to take the job in QA under threat of termination. Julie Matzen sent claimant to see Dr. David W. Niederee, respondent's company doctor.

Claimant's Preliminary Hearing Testimony

Claimant testified his injury occurred when he lifted a clock weighing 50 to 70 pounds. He also insisted that he did lift clocks that weighed more than 100 pounds. Claimant again testified that a cart was not available for his use to move clocks and that he was the only employee who did not have access to a cart. He also acknowledged calling respondent several times in the days after his accident, but did not demand medical treatment. Claimant never returned to work for respondent after he left at noon on March 13, 2012.

On April 2, 2012, claimant completed a disability claim form, requesting short term disability for his back injury. Claimant acknowledged that on the claim form, he indicated the severe back pain started at home while turning, and that he had been having increasing back pain over time. However, the disability claim form he completed also indicated that the accident was related to his occupation and explained on the claim form that he was "[r]equired to lift objects too heavy to perform my job."[2]

Testimony of Respondent's Witnesses

Respondent's president, John Bode, testified that claimant's QA job was a promotion. Mr. Bode testified that he never received a complaint from claimant about the

[2] P.H. Trans., Resp. Ex. 7.

job in QA. Mr. Bode also indicated the largest clock respondent produced that claimant would lift was eight feet long and weighed 32 pounds. Respondent did produce a heavier clock, but it was moved using a cart and was not to be lifted by employees. Mr. Bode testified there was no rule that claimant could not use carts or racks to move clocks.

Mark Esslinger, a member of respondent's engineering team, testified that he worked in QA when there was a need to do so due to illness or a vacancy. He indicated that wheeled carts and bread-rack-type carts are used to move a large number of small clocks or a small number of large clocks. He personally observed claimant using carts to move clocks. Mr. Esslinger testified that when he worked in QA, carts were available for his use. He knew of no rule that claimant was not allowed to use carts. Noel Bertram, another technician, testified most clocks weigh 20 pounds and the largest clock was 96 inches long and weighed 32 pounds.

On March 12, 2012, according to Kevin Wittorff, the heaviest clock respondent shipped out weighed 32 pounds. Mr. Wittorff testified claimant used vacation time to leave at noon on March 13, 2012, to work on his truck. On March 14, 2012, Mr. Wittorff received a telephone call from claimant indicating he had injured his back working on his truck. Claimant did not indicate he was injured at work, nor did he ask for medical treatment. On March 16 and 19, Mr. Wittorff received and recorded several voice messages from claimant. In those voice messages, claimant provided an update of his back condition, but never indicated he had injured his back at work.

Mr. Wittorff testified that on March 21, 2012, claimant came to respondent's place of business and a meeting took place between claimant, Mr. Wittorff and Julie Matzen. During that meeting, claimant expressed that his back injury was work related, which was the first time he had done so. Claimant also indicated that he had a preexisting back injury.

Julie Matzen's description of events was similar to that of Mr. Wittorff. On March 14, 2012, Mr. Wittorff told Ms. Matzen that claimant was not coming to work because he injured his back while working on his truck. On March 21, Ms. Matzen received a voice mail from claimant stating that he had severe back pain and needed to get an MRI. Ms. Matzen testified that claimant came to work on March 22, 2012,[3] and told Ms. Matzen of sustaining a back injury at home, but aggravating it at work. Ms. Matzen then asked claimant if he had reported the injury to his supervisor, and claimant said no. She then sent claimant to respondent's workers compensation doctor, Dr. Niederee at Derby Family Medical Center.

[3] This date appears to be in error, as Dr. Niederee's records reflect he saw claimant on March 21, 2012.

Claimant's Medical Treatment and Evaluation

Claimant first saw Dr. Parman on March 20, 2012. Dr. Parman's notes stated claimant had acute lumbar back pain that radiates to the left buttock. The onset of the back pain was sudden and occurred five days earlier. The notes do not state a cause for the onset of claimant's back pain. Dr. Parman prescribed Lortab and recommended a lumbar MRI. Claimant was seen at Dr. Parman's office again on April 9 and May 1, 2012, and the notes from those visits are silent as to how claimant sustained the back injury.

On March 21, 2012, claimant saw Dr. Niederee and reported the same symptoms and a similar history that were reported to Dr. Parman. Dr. Niederee's diagnosis was a sprain/strain of the thoracic or lumbar spine, unspecified site. Claimant saw Dr. Niederee a second time on March 26, 2012. Nothing in Dr. Niederee's notes state what caused claimant's sudden onset of back pain.

On March 28, 2012, claimant underwent a lumbar spine MRI. Dr. Stephen D. Clark interpreted the results and his impressions were: (1) multilevel lumbar degenerative disc disease, (2) a wide-based disc bulge in the midline, left paramidline region at L4-5 level, which produces significant left neural foraminal and left lateral recess stenosis, (3) L5-S1 level showed bilateral neural foraminal stenosis due to degenerative changes and (4) no acute fractures were detected.

Dr. Parman recommended epidural injections. Two epidural injections were given claimant on April 5 and 19, 2012, by Dr. Chandra Tokala. Dr. Tokala's notes do not indicate how claimant's back injury occurred.

Dr. Abay, upon the recommendation of Dr. Parman, saw claimant on May 17, 2012, for a surgical consultation. Dr. Abay's notes indicated claimant lifts all day long at his job and that caused the back pain. Dr. Abay's assessments were: (1) lumbosacral spondylosis without myelopathy; (2) displacement of thoracic or lumbar intervertebral disc without myelopathy, thoracic intervertebral disc without myelopathy; (3) thoracic or lumbosacral neuritis or radiculitis, unspecified and (4) obesity, unspecified. He recommended a lumbar laminectomy, which he noted was a "Redo widening lumbar laminectomy Left L4-5-S1 with disce[c]tomy L4-5-S1."[4]

At the request of his attorney, claimant was evaluated by Dr. Pedro A. Murati on October 11, 2012. Dr. Murati's report indicated claimant underwent a laminectomy in 1991, which was performed by Dr. Abay. Dr. Murati's report indicated claimant sustained a work-related injury while working for respondent, but contains no other details about how claimant's back injury occurred. Dr. Murati's impressions were low back pain with signs of radiculopathy and left SI joint dysfunction. He provided claimant with temporary

[4] P.H. Trans., Cl. Ex. 2.

restrictions and recommended an extension flexion view x-ray and that claimant be evaluated by a spine surgeon for a probable two-level fusion. With regard to causation, Dr. Murati opined, "The claimant has significant clinical findings that have given him diagnoses consistent with his described accident at work. Therefore, it is within all reasonable medical certainty and probability the prevailing factor in the development of his conditions is the accident at work."[5]

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[6] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.[7]

Respondent argues claimant's testimony is contradictory and gives several examples that need not be repeated here. Respondent contends that claimant injured his back while working on his truck at home and emphasizes that claimant did not report the alleged work-related accident until several days after it occurred. Claimant consistently testified on two occasions of injuring his back while lifting a 96-inch-long clock, despite the fact that he overestimated the weight of the clock.

Dr. Murati opined that within all reasonable medical certainty and probability the prevailing factor in the development of claimant's back injury was the accident at work. There is little in claimant's medical records that refutes Dr. Murati's opinions. Respondent presented no medical expert to contravene Dr. Murati's opinion that claimant's March 12, 2012, accident was the prevailing factor causing his injury. Accordingly, this Board Member finds that at this juncture in the proceedings, claimant proved by a preponderance of the evidence that he sustained a back injury in a work-related accident on March 12, 2012, arising out of and in the course of his employment with respondent.

Respondent also asserts the ALJ exceeded his jurisdiction in granting claimant's request for medical treatment and temporary total disability benefits. K.S.A. 2011 Supp. 44-534a gives an ALJ authority to issue preliminary orders granting medical treatment and temporary total disability benefits. Consequently, this Board Member finds the ALJ did not exceed his authority or jurisdiction in granting claimant's request.

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[5] *Id.*, Cl. Ex. 1.

[6] K.S.A. 2011 Supp. 44-501b(c).

[7] K.S.A. 2011 Supp. 44-508(h).

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[9]

WHEREFORE, the undersigned Board Member affirms the December 4, 2012, preliminary hearing Order entered by ALJ Clark, but modifies claimant's date of accident to March 12, 2012.

IT IS SO ORDERED.

Dated this ____ day of March, 2013.

THOMAS D. ARNHOLD
BOARD MEMBER

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John D. Clark, Administrative Law Judge

[8] K.S.A. 2011 Supp. 44-534a.

[9] K.S.A. 2011 Supp. 44-555c(k).